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In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM KAZONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not published (see 530 F. 2d 962).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1976. A petition for rehearing was denied on April 22, 1976. The petition for a writ of certiorari was filed on May 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was defective because it included both substantive and conspiracy counts.

2. Whether the conspiracy count of the indictment was sufficiently specific.

3. Whether assertedly prejudicial mid-trial publicity requires reversal of the conviction.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of two counts of a six-count indictment that charged him with using extortionate means to collect an extension of credit and with conspiracy to commit that offense, in violation of 18 U.S.C. 894 and 2.[1] He was sentenced to concurrent terms of eight years' imprisonment and total fines of $20,000. The court of appeals affirmed (Pet. App.).

The sufficiency of the evidence proving petitioner's guilt was not challenged in the court below and is not contested here. In brief, the evidence showed that petitioner took over the collection of usurious loans owed to a co-conspirator named in the indictment, Michael Pellicci, and that petitioner and his confederates used implied and express threats to collect payments from one of Pellicci's debtors (see Pet. App. 16).

ARGUMENT

1. Petitioner, although conceding (Pet. 7) that the practice of combining conspiracy and substantive counts in a single indictment "is one of long standing and apparent unanimous approval" and that in this case the evidence under each charge was "for all practical purposes * * * identical," nevertheless urges that the combination here was improper. He offers no convincing reason or judicial authority to require that such a unified

[1]Four others were indicted and tried with petitioner. On the second day of trial, each of the four pleaded guilty to two counts.

scheme of criminal conduct be tried in piecemeal and, to a considerable extent, duplicate proceedings, and we know of none.

2. Petitioner also contends that the conspiracy count was impermissibly vague because it referred to unnamed co-conspirators.

Count I of the indictment charged that "from on or about January 1, 1973, * * * [until] about August 28, 1974," petitioner conspired with his co-defendants, with Michael and Regina Pellicci, and "various other persons whose names are known and unknown to the Grand Jury * * * ". The charge continued (App. 7-8)[2]:

> It was part of said conspiracy that the defendants would unlawfully, willfully and knowingly, expressly and implicitly, threaten the use of violence and other criminal means to cause harm to the person of Manfred Hohenleitner to collect and attempt to collect from said Manfred Hohenleitner an extension of credit.

Ten overt acts were listed and briefly described (App. 8-9).

Petitioner concedes (Pet. 6), that it is unnecessary for all the parties to a conspiracy to be named in the indictment. See *Rogers* v. *United States,* 340 U.S. 367, 375; *United States* v. *Falco,* 496 F. 2d 1359 (C.A. 5); *United States* v. *Green,* 421 F. 2d 1237 (C.A. 2). Moreover, "It is well settled that in an indictment

[2]"App." denotes the appendix to petitioner's brief in the court of appeals.

for conspiring to commit an offense * * * it is not necessary to [describe the conspiracy] * * * with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai* v. *United States*, 273 U.S. 77, 81.

The conspiracy charge in this case set forth the name of the victim, the duration of the conspiracy, the manner in which its objective was pursued, and, as the court of appeals noted (Pet. App. 14-15), ten overt acts that detailed names, dates, and places. This fully apprised petitioner of the charge he was required to meet and gave him adequate opportunity to prepare his defense.[3]

The court of appeals correctly rejected petitioner's claim that the reference to unnamed co-conspirators was confusing and prejudicial. As it pointed out (*id.* at 15):

> * * * the proof at trial was concerned almost exclusively with those named in the indictment; there were some hazy references by the conspirators to the possible involvement of others, but the overwhelming bulk of the evidence concerned the circumstances surrounding the grant of the loan and the specific attempts of collection by the defendants themselves. This case demonstrates vividly that the use of the phrase "various other persons whose names are known and unknown to the grand jury" is not a per se frustration of the [standards an indictment is required to meet].

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[3]The court of appeals properly distinguished the indictment here from the one it discussed in *United States* v. *Tomasetta*, 429 F. 2d 978 (C.A. 1). That indictment charged a substantive offense under 18 U.S.C. 894, not a conspiracy, and it alleged "making threats by an unstated means to an unnamed person on a particular day in a city of moderate size." 429 F. 2d at 979.

3. Finally, petitioner contends that assertedly prejudicial mid-trial publicity requires reversal of his conviction.

On the third day of trial, an article concerning the case appeared in a local newspaper. It reported that petitioner's co-defendants had pleaded guilty, and related excerpts from the government's opening statement and from Hohenleitner's testimony, noting that Hohenleitner had borrowed $1,500 from Michael Pellicci (App. 527). About mid-way through the article, the following paragraph appeared (*ibid.*):

> Pellicci was arrested in January, 1974 in Boston's North End. At that time the prosecutor in the case, Joel Friedman, called Pellicci a "hardened professional criminal who was directly supervised by Gennaro Anguilo." Pellicci was sentenced to a federal penitentiary.

Defense counsel argued that the reference to Anguilo was prejudicial because publicity in the area had established Anguilo as the head of the Boston underworld (App. 299-303), and moved for a mistrial (App. 305). The court denied the motion, and instead asked the jurors whether they had seen the article. When the jurors replied that they had seen and read it (App. 306-308), the court, with the active participation of defense counsel, interviewed the twelve jurors and two alternates individually in chambers, as recommended in *Patriarca* v. *United States*, 402 F. 2d 314, 318 (C.A. 1), certiorari denied, 393 U.S. 1022.

The interviews revealed the following: Of the twelve jurors, eight stated that they had never heard of Anguilo or that they knew nothing about him (App. 310, 312-313,

319, 321, 325, 327, 330-331, 332-333).[4] Two others said that they did not see any reference to Anguilo and that they did not discuss the article (App. 322, 323). One of the remaining jurors said that he had heard of Anguilo in connection with gambling, but that he did not perceive any connection between Anguilo and petitioner (App. 316), that he did not think any less of petitioner as a result of reading the article, and that he could still give petitioner a fair trial (App. 318). The other juror, who had read about Anguilo's mother, did not associate Anguilo with organized crime or with any particular business (App. 328). She said that the article would not affect her view of the case "at all * * * because I swore that I would keep an open mind until the last word was spoken and I do feel that I will be fair and open about it" (App. 329).[5]

At the conclusion of the interviews the court instructed the jury that they were not to consider anything that they had heard or read outside the courtroom, that no adverse inferences were to be drawn from the article, and that they should pay no attention to any news reports (App. 339-340). Five days thereafter, on September 16, 1974, the jury began its deliberations.

Petitioner contends that the jury's exposure to the paragraph referring to Anguilo requires reversal of his conviction. The article, however, linked Anguilo to

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[4]Several jurors also said that there had been some discussion of the article among the jury, but not all of the jurors discussed the article (App. 322, 323), and those who did so said that Anguilo's name was not mentioned (*e.g.*, App. 309-310, 317-318, 325).

[5]Two alternates, neither of whom participated in the jury's deliberations, also indicated some awareness of Anguilo's purported reputation (App. 335-338).

Pellicci, not to petitioner. This distinction was clear to the two jurors who had seen Anguilo's name in the article and, to some degree, recognized it: each of them said it did not influence their view of petitioner. As the court of appeals observed (Pet. App. 19):

> Clearly the court acted within its discretion [in refusing to declare a mistrial]. *Holt* v. *United States*, 218 U.S. 245, 251 (1910). The offending information was buried in the article. It spoke not to defendant's having committed any crime but to an association of a named co-conspirator. This concededly had the potential to prejudice. But, absent exacerbating factors, this is the kind of fortuitous slip which jurors, given adequate and timely curative instructions, have demonstrated their capacity to ignore. We conclude that this article did not adversely affect appellant.[6]

Petitioner urges that his conviction should be set aside because the information in the newspaper article concerning Pellicci's link with Anguilo was attributed to Joel Friedman, a government attorney who had prosecuted Pellicci in an earlier case. However, as the court of appeals stated (Pet. App. 18):

> While we have disapproved of publicity which "emanates from prosecuting officials", *Gorin* v.

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[6]This case is unlike *United States* v. *Concepcion Cueto*, 515 F. 2d 160 (C.A. 1), upon which petitioner relies. In *Concepcion Cueto*, the jury was exposed to publicity at "a crucial moment, immediately prior to closing arguments and shortly before they began their deliberations." 515 F. 2d at 164. The article there in issue described the defendant as "a leading drug trafficker, a 'fat fish', and an armed desperado who had engaged in an escape and a shoot-out with police." The report "put the finishing touches" on the prosecutor's arguably improper cross-examination, and no curative instructions were given. *Ibid.*

United States, 313 F. 2d 641 (1st Cir. 1963), the statement here had been made a year and a half earlier, indeed prior to the crimes alleged in the indictment. It clearly was not intended to affect this trial, and we cannot fault the prosecution for its current appearance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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